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FILED
AUG 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-142

IN THE

Supreme Court of the United States

October Term, 1988

ESTATE OF CLOYD A. PAYNE, BY DAVID MARLIN PAYNE, PERSONAL REPRESENTATIVE ON BEHALF OF ESTATE AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

GRANT COUNTY COURT, JOHN P. PORTER, JUDGE; GRANT COUNTY, AND LINLEY E. PEARSON, ATTORNEY GENERAL OF INDIANA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

LINLEY E. PEARSON
Attorney General of Indiana

LISA M. PAUNICKA
Deputy Attorney General
[Counsel of Record]

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6201

Counsel for Respondents

Central Publishing Company, Inc., Indianapolis, IN 46206

QUESTIONS PRESENTED

1. Whether the Petitioners were denied the right to post full cash bail.

2. Whether the assessment of the administrative fee in posting cash bail bonds violated the Petitioners' constitutional rights.

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The Respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Indiana Court of Appeals' opinion in this case. That opinion is reported at 508 N.E.2d 1331 (1987).

STATEMENT OF THE CASE

For a better understanding of the facts of the case, the terms "cash bail bond" and "full cash bail" are defined as follows. A "cash bail bond" is a bond in which 10% of the amount of bail is posted by an accused in cash and 1% of the total bail is retained

by the court as an administrative fee upon conclusion of the case. A "full cash bail" is the posting of the entire amount of bail in cash.

The Grant County Court, on October 29, 1981, established a bail schedule which set forth the amount of bail required for certain classes of offenses.[1] The bail schedule also provided that the accused could "make personal application for a change of Bail type or for a reduction in Bail to the regular presiding Judge." In addition, a general order issued by the court, on the same day, stated that a person could satisfy bail by providing 10% of the amount specified in the general order as bail and that the court would return 90% of the deposited sum at the conclusion of the action and would retain 10% of the amount deposited (or 1% of the entire bail amount) to cover administrative costs. If the accused posted a surety bond, no administrative fee was charged.

One of the Petitioners, Cloyd Payne (Payne), was arrested for driving while intoxicated and later released after posting a cash bail bond of $300; bond set at $3,000. Payne and his surety signed an acknowledgment as to their liability for the $300 and authorized the court to retain the lesser of 10% of that amount or $50 as an administrative fee. Subsequently, Payne pled guilty to reckless driving. The amount of the cash bond was returned to Payne, minus a $30 administrative fee retained by the court.

Previously, the Court of Appeals decided that Payne was entitled by Indiana Code Section 34-1-66-1 (1982) to post full cash bail. *Estate of Payne v. Grant County Court*, Ind. App., 470 N.E.2d 785 (1984), *trans. denied*.[2] After remand, the trial court certified the suit as a class action.

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[1] For a Class A misdemeanor, for example, the bail schedule provided that a surety bail bond of $3,000 or a cash bail bond of $300 would be accepted by the court.

[2] The Court of Appeals reversed a finding of summary judgment in favor of Judge Porter so that the trial court could determine whether Payne was afforded an opportunity to post full cash bail. *Id.*

On February 24, 1986, the cause was submitted to the trial court on stipulated facts. The stipulated facts disclosed that the parties agreed that the Petitioners were not orally advised by the trial court of their right to post full cash bail but were informed that the administrative fee would be charged in the case of a cash bail bond regardless of the ultimate finding as to their guilt or innocence. Also, the parties stipulated that none of the Petitioners ever requested to post full cash bail. On July 30, 1986, the trial court issued a decision finding that the Petitioners were not denied the right to post full cash bail. On appeal, the Court of Appeals ruled that the Petitioners were not denied their right to post full cash bail and that the assessment of the administrative fee did not violate the Petitioners' constitutional rights. *See Estate of Payne v. Grant County Court*, Ind. App., 508 N.E.2d 1331 (1987).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The decision below does not raise the first question presented in the petition.

The first question presented in the petition is whether the Petitioners were denied the right to post full cash bail. However, instead of responding to this question, the Petitioners ignore it and merely assert — without any citation to relevant authority or to the record, that the Grant County Court erred by failing "to establish a full cash bail absent an administrative fee" (Pet., p. 8). The Indiana Court of Appeals did not decide that question in this proceeding. In its opinion, the Court of Appeals ruled that the Petitioners were not denied the right to post full cash bail even though neither the court's general order nor the bail schedule specifically mentioned the Petitioners' right to full cash bail (Pet., pp. A10-A11). The Court of Appeals also stated that the general order and the bail schedule did not preclude other statutorily recognized bail options. The "new" question which the Petitioners present to this Court cannot be fairly extracted from the opinion below. Thus, review by this Court is precluded.

2. The assessment of the administrative fee in posting cash bail bonds did not violate the Petitioners' constitutional rights.

The Petitioners challenge the constitutionality of the administrative fee in posting cash bail bonds, claiming the assessment is a denial of due process and an unlawful taking without just compensation and without rational basis. A court may properly charge an administrative fee when an accused posts a cash bail bond. In *Schlib v. Kuebel*, 404 U.S. 357, 92 S.Ct. 479 (1971), this Court ruled that a 1% administrative fee, such as that charged in the instant case, is not a cost of prosecution but rather an administrative cost imposed on all who take advantage of the benefits of a cash bail bond instead of using the services of a bail bondsman. Moreover, the fee which is paid to the county clerk covers the costs of processing bail bonds and related paper work. Thus, there is no unlawful taking of the property of the Petitioners to which they are entitled to compensation. The Petitioners voluntarily parted with 10% of the amount they deposited in exchange for the benefits received from not having to deal with a bail bondsman and, thereby, most likely forfeiting the full 10% of the bail amount.

In addition, the Petitioners allege that the administrative fee is without rational basis because an accused posting full cash bail is not required to pay the administrative fee. In response to a similar argument, this Court in *Schlib* stated:

> [O]ne who deposits the full amount of his bail in cash is dispossessed of a productive asset throughout the period of the deposit; presumably, at least, its interim possession by the State accrues to the benefit of the State. Further, the State's protection against the expenses that inevitably are incurred when bail is jumped is greater when 100% cash . . . is deposited or obligated than when only 10% of the bail amount is advanced.

Schlib, supra, 404 U.S. at 367, 92 S.Ct. at 485. Hence, the method of imposing a percentage fee in the case of a cash bail bond is not without rational basis.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

LINLEY E. PEARSON
Attorney General of Indiana

LISA M. PAUNICKA
Deputy Attorney General
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